90-1760

No. 90-

Supreme Court, U.S.
FILED
MAY 13 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should legislative history be used by a federal agency to misinterpret a statute by adding a concept, "yardstick competition," which has no basis in law or economics and which contradicts the express purposes and intent of the statute?

2. Should a state agency, the New York Power Authority (PASNY), rather than the Federal Energy Regulatory Commission (FERC), be accorded deference in its interpretation and implementation of a unique federal statute where Congress gave PASNY the primary responsibilities?

3. Should FERC be permitted to intrude upon state sovereignty, with neither

express nor implied statutory authority to do so, by imposing an arbitrary doctrine, "yardstick competition" upon New York and other states' public utility regulation?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit were those in the caption, and as indicated below.[1]

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1. As petitioners: Allegheny Electric Cooperative, Inc., Vermont Department of Public Service, New York City Public Utility Service, Upstate Public Utility Services Association, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative,Massachusetts Municipal Wholesale Electric Company and Power Authority of the State of New York,

As intervenors: Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation City of Cleveland, Ohio, Public Service & Gas Company, City of New York, Port Authority of New York & New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Co.

The New York City Public Utility Service and the Vermont Department of Public Service petition separately for certiorari.

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IN THE

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OCTOBER TERM, 1990

No. 90

COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner County of Westchester Public Utility Service Agency (COWPUSA) herein respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1990, and for which a rehearing was

denied by that Court on February 12, 1991.

OPINIONS BELOW

The decision of the Federal Energy Regulatory Commission is reported at 48 FERC ¶61,124 (1989) (Opinion 329)(64a).[1] The decision of the Commission denying rehearing is reported at 49 FERC ¶61,069 (1989)(110a). The decision of the United States Court of Appeals is reported at 922 F.2d 73 (2d Cir. 1990) (1a).

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1. The opinion is reprinted in the Appendix to the Petition for a Writ of Certiorari. The Appendix is jointly filed by petitioner herein and by New York City Public Utility Service and by Vermont Department of Public Service, which petition separately for review by this Court. Citations to the Appendix are made to the page and number therein as "(__a)". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "__A. Vol.__".

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 17, 1990 (1a). The Second Circuit denied a rehearing on February 12, 1991 (115a). This petition is filed within 90 days thereof pursuant to 28 U.S.C. §2101(c). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 836 of Title 16 of the United States Code is set forth in the Appendix (116a).

STATEMENT OF THE CASE

The County of Westchester Public Utility Service Agency (COWPUSA) agrees with the statement of the case as recited in the Petition for Certiorari of the New York City Public Utility

Utility Service (NYCPUS). Therefore, set forth below is a summary of those additional facts pertinent to COWPUSA's petition.

The Niagara Redevelopment Act (NRA), 16 U.S.C. §§836 and 836a, authorized the development of the United States' share of the power of the Niagara River pursuant to a treaty with Canada, the Niagara Treaty, 1 U.S.T. 694. Under the NRA, the Federal Power Commission (now Federal Energy Regulatory Commission or FERC) was authorized and directed under the NRA to issue PASNY a license for the construction and operation of a hydroelectric project. The Niagara Power Project followed. It was funded and constructed by the New York Power Authority (PASNY), an instrumentality of the State of New York. No federal funds nor substantial federal role

were involved. Fifty percent of project power is, however, subject to what the court below has characterized as a "federal-type" preference clause, the interpretation of which is the subject of this litigation.

In 1976, in a case involving the preference entitlements of neighboring states, the Federal Energy Regulatory Commission (FERC) defined "public body" in such a way that municipal distribution agencies (MDAs) would apparently meet the preference requirements of the NRA. 55 FPC 1109, 1113-1116 (1976) (2900-2901A, Vol.IX).

COWPUSA is an MDA created by Westchester County in 1982 and authorized under Article 14-A of the New York General Municipal Law to sell and distribute electricity (360A, Vol. II). COWPUSA began receiving preference

power from the New York Power Authority, for the benefit of Westchester residents and industry, in July 1985.

However, in 1986, complaints were filed with FERC by various municipal utility associations challenging PASNY's allocation of preference power to the MDAs. After an adjudicatory administrative hearing and initial decision, the FERC Commissioners upheld the administrative law judge's holding that public bodies must provide "yardstick competition" and meet related requirements[2] in order to receive preference power under the NRA.

Municipal Electric Utilities

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[2] The discussion of "yardstick" in this petition includes these related requirements that the public body 1) be responsible for meeting the requirements and concerns of its retail customers, and 2) have control of the electrical distribution system.

Ass'n of New York State v. PASNY (Opinion 329), 48 FERC ¶61,124 (1989) (64a). The Second Circuit has upheld this interpretation in the present case.

Municipal utilities and rural electric cooperatives have received the predominant share of Niagara "preference" power to date. However, their proportionate use of power in New York State has apparently decreased over the years. At the time the NRA was enacted, they used roughly five percent (5%) of New York's power. Hon. Jacob Javits' statement in Senate Debate, 103 Congressional Record 14443 (August 12, 1957). By the time of the FERC hearing in the present case in 1986 and 1987, their customers constituted a mere two percent (2%) of the State's

residential consumers. (2883A, Vol. IX).

Consequently, as presently interpreted by FERC and the Second Circuit, preference power is available only to a small proportion of New York consumers. Nevertheless, it is economically impracticable for municipalities presently without public power to meet the "yardstick" criteria (e.g., the ability to displace incumbent private utilities) in order to qualify for receipt of preference power. Presently, Niagara preference power is not widely distributed to New York State consumers, which directly contradicts the stated goals of the NRA.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in the case at bar because the Court

of Appeals for the Second Circuit has erroneously decided an important issue of statutory interpretation which must be settled by this Court. The Second Circuit has used questionable legislative history to engraft onto the NRA a "yardstick competition" test and related requirements which defeat the express purposes and intent of the NRA. Under FERC's "yardstick" requirement,[3] a miniscule number of consumers receive virtually all the Niagara preference hydropower. In addition, the "yardstick competition" requirement has interfered with PASNY's implementation of the NRA and intrudes upon New York and neighboring states' local public utility

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[3] In the discussion below, the term "yardstick" will include the related requirements set forth in footnote 2, supra.

regulation, in violation of the principles of federalism.

These are important issues of law and of vital importance to the administration of the NRA. Therefore, certiorari should be granted. Federal Power Comm'n v. So. Calif. Edison Co., 376 U.S. 205 (1964).

POINT I

FERC'S "YARDSTICK COMPETITION" REQUIREMENT IS BASED UPON DUBIOUS LEGISLATIVE HISTORY CONTRARY TO THE CLEAR LANGUAGE AND INTENT OF THE NIAGARA REDEVELOPMENT ACT (NRA)

FERC asserts in this litigation that public power can compete with, or somehow provide a "yardstick" by which to compare, incumbent private utilities' service and rates. The Court should reject this concept since "yardstick competition" is a nonsensical economic

doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA. The yardstick competition concept is solely a product of a gross misuse of legislative history by FERC to regulate that which Congress did not intend it to regulate.

Moreover, as applied in this case, the "yardstick" concept actually defeats the goals of the NRA. The clear intent of the NRA is that Niagara hydropower be widely distributed by the State of New York (through PASNY) to rural and domestic users within New York and neighboring states. Congress could not have intended, as the NRA is presently interpreted, that a mere two percent (2%) of the State receive the overwhelming share of the preference hydropower.

A. **The NRA is Clear on its Face and Neither Contains nor Implies Any Concept of "Yardstick Competition"**

The preference clause of the NRA is clear on its face. It states:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. (emphasis added)

16 U.S.C. §836(b)(1).

The above language unequivocally states that Niagara preference power is intended for the people as consumers at

the lowest available rates and that it should be distributed so as to encourage the widest possible use. The NRA also provides that PASNY shall give preference to "public bodies."

FERC now defines "public body" in such a way that virtually all of the preference power is given to a small minority of consumers. FERC's test for qualification is that the public body must provide competition with the private utility, which the public body will provide if it:

a) creates a threat of takeover or displacement of the public utility;

b) substantially meets the energy needs of its customers;

c) provides customers and regulators with a basis for comparing the rates and quality of service;

d) is directly responsible for meeting the requirements and responding to the concerns of its retail customers with the ability to initiate corrective action; and

e) has control of the distribution goals[4] (10a).

The above test for qualification for preference power defeats the NRA's enunciated system.

1. The NRA Requires "Widest Possible Use" of Preference Power

FERC and the court below fail to explain how the present allocation of preference power, and the use of FERC's "public body" test, complies with the NRA mandate to encourage the "widest possible use" of preference hydropower. Even assuming, arguendo, that yardstick competition is possible, the fact remains that there are only a very small number of such purported "yardstick competitors." They are municipal utilities and electric cooperatives which may be able to sell power

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[4] 922 F.2d 73, 78-79 (2d Cir. 1990)

inexpensively, but which cannot or will not expand their territories, at least in part due to the limited supply of Niagara hydropower. For example, upstate New York public utilities can sell power for 3 cents per kilowatt hour, but have insufficient power to expand into New York City, where consumers pay 16 cents per kilowatt hour (2631-32A, Vol. IX). And in Rhode Island, the tiny Pascoag Municipal Water and Fire District, serving fewer than 3,000 people, receives the only preference power in that state.

Moreover, there is no reason for the public utility to expand its territory to displace another utility when this will only diminish the amount of inexpensive power for its present customers. To displace a neighbor will mean increased rates. To limit the

hydropower to current recipients will ensure their continued low rates. However, this is contrary to the "widest possible use" contemplated by the NRA.

There is every reason to conclude that there is no place for "yardstick competition" within the NRA. "Yardstick" allows only the few fortunate enough to reside within a public utility's franchise territory to enjoy the benefits of extremely inexpensive hydropower. This discourages wide use, in direct contravention of the statutory mandate.

2. Principle Goal of NRA Cannot Be To "Foster Competition," When the NRA Itself Provides Power to "Competitors"

The language of the NRA neither requires nor implies that competition be promoted between public bodies and

private utilities. On the contrary, the NRA explicitly allows private utilities to receive preference power which power is withdrawable only if necessary to meet the "reasonably foreseeable needs" of the preference customers.[5] NRA Sec. 836(b)(1). The court below states that the primary goal of the NRA is to make public bodies "yardsticks" by which to compare private utilities. However, to contend that preference power is to be used to promote yardstick competition, but at the same time allocate competitors such power, is to frustrate the professed "yardstick" goal and is self-contradictory.

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[5] In addition, the NRA provides that PASNY is to lease, purchase or construct lines for the wholesale transmission of power and energy to preference customers, neighboring states and "privately owned companies." NRA Section 836 (b)(4).

Yardstick competition becomes even less plausible when it is noted that, with regard to power sold to any purchaser for resale, PASNY is to include adequate provision for establishing resale rates. As to these sales for resale, PASNY would hold the key to how much of a "yardstick" any purchaser will be, since PASNY sets the price.

B. There is No Need to Apply Legislative History Because the NRA is Clear on Its Face

As to agency construction of a statute, this Court has stated that if the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, USA v. NRDC, 467 U.S. 837, 842-43 (1984). It is

submitted that FERC's construction of the NRA does not give effect to the unambiguously expressed intent of Congress, and that PASNY's interpretation qualifying petitioner for NRA hydropower does.

The legislative purpose of a statute is expressed by the ordinary meaning of the words used. United States v. James, 478 U.S. 597, 604 (1986). It is presumed that the words used by Congress are conclusive evidence of the legislative purpose. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984), reh. den. 467 U.S. 1267 (1984).

The court below chose to ignore the clear words of the NRA and instead adopted a dubious economic concept based upon legislative history which the Second Circuit itself characterized in

an earlier case as "agonizingly long" and "contain[ing] many statements which taken out of context, appear to support varied interpretations of the statute." PASNY v. FERC, 743 F.2d 93, 105 (2d Cir. 1984).

The NRA is clear and unambiguous on its face. It is only the imported "yardstick competition" requirement which has created conflicting goals and ambiguity. It is clear that the NRA demands that preference power be made available to the "people as consumers" in "such manner as to encourage the widest possible use." NRA §836(b)(1). It is only when the non-statutory yardstick competition requirement is imposed that these goals are not met.

C. Yardstick Competition, at Least in the Context of the NRA Hydropower, Makes No Economic Sense and Is Contrary To the Purpose and Intent of the NRA

As a matter both of economics and reality, the yardstick competition requirement as applied to the NRA restricts preference power distribution to a small segment of consumers. Because the power is comparatively so inexpensive it serves as a "yardstick" to nothing. And because it is of limited, finite quantity, the hydropower cannot realistically be used by its municipal or cooperative recipients to displace private utilities.

"Yardstick competition" only makes sense if it is to compare costs between comparable utilities operating under similar conditions.[6] As one

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[6] Joskow and Schmalensee, "Incentive Regulation for Electric Utilities," 4 YALE JOURNAL ON REGULATION at 34 (Fall 1986).

commentator has stated, "[p]ublicly owned firms with access to subsidized capital and preference power cannot be usefully compared to private firms that lack these advantages."[7] In any event, the private utility, as a "natural monopoly" given an exclusive territory in exchange for rate regulation, need not concern itself with public competition. The private utilities' profits are based upon costs and a reasonable return on capital according to a standard ratemaking formula. The electrical pricing of neighboring utilities is simply irrelevant to this process.

The yardstick competition doctrine is ill-conceived when applied to the Niagara Project. The Second Circuit

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[7] Id. at footnote 77.

came close to conceding this in a prior case where it stated:

> Assuming arguendo the improbability of such [yardstick] competition (although we take judicial notice of the recent sharp decline in the price of oil as a source of private power) "[i]t is not for FERC or ourselves to second-guess [Congress'] basic determination."

Metropolitan Transp. Auth. v. FERC, 796 F.2d 584, 593 (2d Cir. 1986), citing PASNY, 743 F.2d at 105. Furthermore, as explained in the NYCPUS petition for certiorari at pages 31-32, FERC's determination as to yardstick competition is entitled to no special administrative deference, since FERC merely obeyed the prior Second Circuit precedent.

Because the NRA is clear on its face, and because FERC's implementation

of yardstick competition defeats the NRA's stated goals, the concept of "yardstick competition" has no place in the implementation of the Act.

POINT II

IT IS PASNY, NOT FERC, WHICH HAS RESPONSIBILITY FOR COMPLYING WITH AND INTERPRETING THE NRA; PASNY'S INTERPRETATION NEED NOT INCLUDE "YARDSTICK COMPETITION"

The NRA is a unique statute. It does not involve federal hydropower, federal funding or federal land. The federal involvement stems from the treaty entered into between the United States and Canada in 1950 concerning the waters at the international boundary at Niagara Falls. During the debate concerning the enactment of the NRA, it was clearly understood that this was a New York project, not a federal project, and was supported solely by New York

dollars. 103 Congressional Record 13194-13211.

The late Senator Jacob Javits, former Attorney General from New York, also commented about the concept of a "yardstick":

> The yardstick principle in this particular case is quite inapplicable by virtue of the fact that the State of New York, under New York law, has a power authority which fixes the rates for the power it will produce which is going to be resold, no matter who resells it, even if resold over private transmission lines.

103 Congressional Record 14444. Senator Javits' comments remain valid today. For example, NRA Section 836(b)(5) provides for regulation by PASNY, not FERC, of resale rates.

The NRA involves a hybrid preference clause which provides that Niagara hydropower be distributed widely to

rural and domestic users within a reasonable transmission distance, but that this distribution is by a state agency--PASNY. Thus, it appears clear from the NRA that PASNY and state law are to govern the allocation and distribution of preference power within the broad parameters set forth in the NRA.

FERC has turned this statutory scheme on its head by giving itself a lead role concerning Niagara preference hydropower. FERC has made itself the policeman of the NRA even though this is the role of the state agency, PASNY. The NRA clearly states that, in distributing power, PASNY is to 1) give preference and priority to public bodies and nonprofit cooperatives, 2) provide for withdrawal of power from private utilities when needed by public bodies,

3) allocate a reasonable portion of the power to neighboring states, and 4) approve resale rates. NRA Section 836(b)(1,2,5).

The clear intent of the NRA is that PASNY is to implement the NRA without the supervision of FERC. In the one instance where Congress required PASNY to obtain FERC's approval (construction of scenic drive and park), Congress clearly provided for this in the NRA. NRA Section 836(b)(6). Similarly, Congress clearly stated that, if there were any conflict between language of the NRA and the FERC's rules of practice and procedure, the NRA would govern. See, 16 U.S.C. §836a.

The NRA stands in stark contrast to federal laws such as the Natural Gas Act which do intend a comprehensive regulatory scheme and therefore preempt

state regulation. See, e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi, 474 U.S. 409 (1986). Rather, the NRA presents a situation where Congress has not exercised power to preempt state regulation. Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989).

FERC's imposition of a "yardstick" requirement upon an agency of the State of New York charged by Congress with distributing the electrical power of the Niagara exceeds what Congress authorized. Congress did not intend for federal preemption by administrative fiat to extend so far.

POINT III

FERC'S "YARDSTICK COMPETITION" PRECONDITION TO NEW YORK AND OTHER STATES' RECEIPT OF PREFERENCE HYDROPOWER INTRUDES ON STATE SOVEREIGNTY AND SO VIOLATES THE TENTH AMENDMENT

The NRA is uniquely local in character. Eighty percent of the preference power is reserved for the benefit of New York consumers. Twenty percent is allowed to states "within reasonable transmission distance." NRA Section 936(b)(2). PASNY is the agency which built and operates the Niagara Project and which distributes its hydropower. To the extent that neighboring states establish entities which can receive preference power in accordance with the NRA, PASNY can distribute to these out-of-state entities. The Congressional debates on the NRA included a discussion that

states could enact laws to allow for receipt of preference power. See, e.g., 103 Congressional Record 13196 (House), 14439 (Senate). Thus, the legislative history is in accord with the plain language of the NRA that the states, and in particular New York through PASNY, were to apply state law in distributing hydropower according to the mandates of the NRA.

The goals of the NRA will be met by this Court's rejection of the concept of "yardstick competition." The licensee, PASNY, as well as qualifying neighboring states, will be able to distribute the preference hydropower "widely," in a manner "primarily for the benefit of the people as consumers, particulary domestic and rural consumers," and at the "lowest rates reasonably possible," pursuant to the terms of the NRA.

Within New York, recipients will be "public bodies" entitled to receive and distribute power under New York law, namely, public utilities, rural electric cooperatives, and municipal distribution agencies. Other states will have the choice to do exactly the same, as petitioners Vermont (VDPS) and Rhode Island have been attempting to do for quite some time.

On the other hand, to allow FERC to preempt state law and policy as to the operation and existence of public utilities, is to permit intermeddling with matters fundamentally of state and local concern. State public utilities are granted monopoly jurisdiction and are extensively regulated. FERC v. Mississippi, 456 U.S. 742, 772 (1982) (Powell, J. concurring and dissenting in part). Federal regulators should only

reluctantly intrude.

This Court has held that state law can survive federal preemption. Pacific Gas & Electric v. State Energy Resources Conserv., 461 U.S. 190, 225 (1983). Indeed, it is assumed that the historic police powers of the States are not superseded by a federal statute unless that is the clear and manifest purpose of Congress. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988). FERC should not be permitted to impose "yardstick competition" upon state and local utility law and policy when this was not the clear intent of Congress.

A holding which permits FERC to place a yardstick competition requirement upon state utility regulation would be, as Justice Powell stated in his partial dissent in

Mississippi, for the federal government to "preempt this important state function" and to break the "longstanding deference to principles of federalism." 456 U.S. at 772. In Mississippi, Congress had expressly granted FERC powers under a comprehensive federal statutory scheme. FERC has received no such powers under the NRA, the latter statute being quite distinguishable.

In the instant case, PASNY and the neighboring states are indeed compelled to become "bureaucratic puppets" of the federal government in the distribution of preference NRA hydropower. Id. 456 U.S. 742, 783, (O'Connor, J. dissent) As to intrusion into traditional local utility regulation, FERC's intrusion upon state sovereignty goes too far.

CONCLUSION

The Second Circuit and FERC have seriously misinterpreted the Niagara Redevelopment Act by reading into the Act, clear on its face, the highly questionable doctrine of "yardstick competition." In addition, FERC has assumed more authority than authorized under the NRA, and intruded into areas so peculiarly of state and local interest as to implicate state sovereignty. Because these issues are of vital importance to the administration of the NRA, Petitioner County of Westchester Public Utility Service Agency (COWPUSA) requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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May 10, 1991

GLOSSARY OF ACRONYMS

COWPUSA - County of Westchester Public Utility Service Agency

FERC - Federal Energy Regulatory Commission

NRA - Niagara Redevelopment Act

NYCPUS - New York City Public Utility Service

PASNY - New York Power Authority or Power Authority of the State of New York

VDPS - Vermont Department of Public Service

(3) (2) (2) (2)

Nos. 90-1721, 90-1725, 90-1760, 90-1949

Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

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VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND THE RHODE ISLAND PUBLIC UTILITIES COMMISSION,
Cross Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court below acted properly in affirming the Federal Energy Regulatory Commission's determination of the criteria which must be met in order to be a "public body" under the Niagara Redevelopment Act and its determination that petitioners did not qualify to purchase Niagara Redevelopment Act preference power?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI AND TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc. ("Allegheny"), the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), the Municipal Electric Utilities Association of New York State ("MEUA") and the Public Power Association of New Jersey ("PPANJ") (collectively referred to herein as "Public Systems"), all intervenors in the court below,

respectfully pray that the Court deny the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949.

STATEMENT OF THE CASE

This case presents for consideration the third recent and related appeal of a Federal Energy Regulatory Commission ("FERC" or "Commission") decision concerning the allocation of Niagara Project hydroelectric power under the Niagara Redevelopment Act, 16 U.S.C. § 836 *et seq.* ("NRA").[1] Less than five years ago, this Court denied multiple petitions for writs of certiorari in *MTA*. The petitions filed here present nothing that has not previously been submitted to this Court. They should also be denied.

The Court's evaluation of the petitions will be greatly aided by a brief overview of the NRA and recent litigation concerning its meaning. The NRA directed the Federal Power Commission (now the FERC) to issue a license to the Power Authority of the State of New York ("PASNY") under Part I of the Federal Power Act, 16 U.S.C. § 791 *et seq.* The license permitted PASNY to construct and operate a hydroelectric power project on the Niagara River, between New York and Canada.

The NRA also directed the Commission to include a "preference" clause in the license, which states that:

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[1] The other two cases are: *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*") and *Metropolitan Transp. Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Elec. Coop., Inc. v.* FERC, 479 U.S. 1085 (1987) ("*MTA*").

> [T]he licensee in disposing of 50 per centum of the project power *shall give preference and priority to public bodies* and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1) (emphasis added). This clause, the meaning of which was litigated in *PASNY* and *MTA*, was explained in the opinion under consideration here:

> The fifty percent of Niagara Project power set aside for "public bodies and nonprofit cooperatives" is referred to as preference power. Those entities eligible to receive an allocation of this preference power are called preference customers. To be a "preference customer", an entity first must qualify as a "public body".

Allegheny Electric Cooperative, Inc. v. FERC, 922 F.2d 73, 76-77 (2d Cir. 1990) ("*Allegheny v. FERC*"), P.A. at 5-6.[2] The three petitioners and the cross-petitioner herein all claim that they are NRA "public bodies," and are thereby entitled to preference power allocations.

A. *Prior Cases.* Litigation over the NRA's phrase "public bodies" began several years ago. In the 1984 *PASNY* decision, the Second Circuit affirmed the Commission's determination that an NRA "public body" must, *inter alia*, be the type of entity which fosters "yardstick competition," described in its sim-

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[2] References to the decisions of the Commission and the court below included in the "Appendix to Petitions For Writ of Certiorari" are designated as "P.A.".

plest form as competition by example. *PASNY*, 743 F.2d at 105. The FERC and the court also ruled that NRA "public bodies" are only those publicly-owned entities that sell and distribute preference power directly to consumers. *MEUA v. PASNY*, Opinion No. 151, 21 FERC (CCH) ¶ 61,021 at pp. 61,105-11, 61,129 (1982). In affirming the Commission, the Second Circuit conducted its own analysis of the NRA's legislative history, and also accorded " 'great deference' " to the Commission's conclusions, because they came from the "agency charged with [the NRA's] administration." *PASNY*, 743 F.2d at 103, 105 (citations omitted).

In *MTA*, the FERC and the Second Circuit considered whether New York's Metropolitan Transportation Authority ("MTA") and the Vermont Department of Public Service ("VDPS") were "public bodies." The FERC concluded that the MTA and VDPS were not NRA "public bodies," because neither was capable of selling and distributing power directly to consumers at retail. *MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC (CCH) ¶ 61,323, at p. 61,651 (1985). The Second Circuit again affirmed the FERC's determinations. *MTA*, 796 F.2d at 590, *quoting* Opinion No. 229, 30 FERC at 61,651. In so concluding, the court again reviewed the NRA's legislative history, stating:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that is what Congress intended the term to mean.

Id. at 591. This Court then denied two petitions for writs of certiorari and a cross-petition filed by the State of Rhode Island. 479 U.S. 1085 (1987).[3] But for the change in certain parties, *MTA* might well be said to collaterally estop relitigation of the issues presented by petitioners here.

B. *The Present Case.* This case stems from PASNY's 1985 decision to allocate preference power to numerous so-called "Municipal Distribution Agencies" ("MDAs"),[4] including petitioners County of Westchester Public Utility Service Agency ("COWPUSA") and New York City Public Utility Service ("NYCPUS"), and to the revised VDPS.[5] Both the MDAs

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[3] Two of the petitions, filed by the MTA, No. 86-736, and by the State of Rhode Island, No. 86-942, challenged FERC's ruling on the nature of the NRA's "preference" clause and the definition of the term "public bodies". Rhode Island's 1986 cross-petition raised many of the issues raised again here. Petitioner Allegheny sought review only of the FERC's interpretation of the NRA term "neighboring states."

The State of Rhode Island's current cross-petition is similar in at least one respect to its 1986 cross-petition: it is based on an exceedingly limited participation in the case at the Commission. Rhode Island did not seek to participate in the hearing underlying Opinion No. 329, and was only granted intervention in that decision itself. P.A. at 68-69.

[4] The term "MDA" refers to paper agencies created in counties and cities in New York State, with the unusual assistance of New York's investor-owned utilities, the MDAs' alleged competitors, to serve as conduits for the delivery of NRA preference power to customers of investor-owned utilities.

[5] As explained in *Allegheny v. FERC* (P.A. at 8), following the issuance of Opinion No. 229, VDPS was the subject of state legislation "aimed at satisfying the Commission's 'public body' definition" in *MTA* and *PASNY*.

and VDPS sought to satisfy the NRA "public body" criteria of *MTA* and *PASNY* by entering into arrangements under which petitioners purported to serve "their" customers by purporting to "lease" electric distribution facilities from allegedly competing local investor-owned utilities. These leases provided that the private utilities would continue to perform all distribution and billing functions. Public Systems challenged PASNY's allocation decisions at FERC, contending that neither the MDAs nor VDPS constituted "public bodies."

In *MEUA v. PASNY*, Opinion No. 329, 48 FERC (CCH) ¶ 61,124 (1989), the Commission explained that the MDA and VDPS "lease" arrangements had several pertinent common features. In the case of the MDAs, the Commission found that the investor-owned utility "lessor":

> (1) . . . retains the franchise responsibility to supply the full requirements of its customers for electric service; (2) the IOU [investor-owned utility] remains responsible to the consumers for continuity of electric service to the same extent (but no greater extent) as in the absence of the lease agreements; thus, control over quality of service remains with the IOU; (3) the IOU has exclusive control of its entire system, leaving no room for assertion by the MDAs of control over distribution facilities; (4) the IOU may suspend or terminate the agreement if the arrangements result in higher energy costs for consumers, would increase the IOU's rates, reduce the IOU's net income for its stockholders, or if condemnation proceedings are instituted

> against the IOU; and (5) the IOU issues the bills, which do not show individually the rates of preference power, but only a notation that there has been a saving of a specified amount because of preference power, thus giving no opportunity to compare the quality of service or price.

P.A. 94-95. With regard to VDPS, the Commission confirmed (P.A. 100-101) the conclusions of its Administrative Law Judge ("ALJ") that, despite the "leases," VDPS: (1) had no direct responsibility for retail electric distribution, "since under the lease and operating agreements and the service contracts the [lessor] utilities perform all the utility functions"; (2) had no control of the "lessor's" distribution system; (3) could not foster competition because VDPS's "costs of operations are basically those of the utility"; and (4) could only "serve" customers who were also customers of the privately-owned utility "lessor". Initial Decision, P.A. 60-61.[6] On the basis of these fac-

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[6] VDPS, citing Appendix page 60, states that the ALJ "concluded that [VDPS] . . . has the ability to provide its service to virtually any resident of Vermont upon request." VDPS's selective quotation is misleading. In fact, the Judge qualified the cited "conclu[sion]" as follows:

> While VDPS will supply electricity to any resident on request, one condition exists, the resident must also be a customer of the privately owned utility. Otherwise, power is not available. Thus, there is no real competition for new customers.

P.A. at 60. In other words, VDPS could not "provide its service to virtually any resident" unless the resident was in fact served by the local investor-owned utility. The result is that the retail customer has no choice of electric suppliers, and the only distributor is the investor-owned utility, not the alleged public body.

tual findings, the Commission determined that neither the MDAs nor VDPS qualified as an NRA "public body," because they were not selling and distributing preference power directly at retail.

The FERC, in Opinion No. 329, also refined the "yardstick competition" standard it had developed in the prior cases, holding that an NRA "public body" must provide such competition by: (a) being the type of entity which can threaten to take over or displace the private utility; (b) substantially meeting the energy needs of *its* customers, and (c) providing a basis for comparison with investor-owned utility rates and service. A "public body" must be directly responsible for serving its retail consumers, and must control its distribution system. Opinion No. 329, P.A. at 87-89, 94.[7]

The Commission determined that VDPS and the MDAs did not meet any of these criteria, as they could not pose any competitive threat to investor-owned utilities. The Commission concluded that under the "lease" arrangements, investor-owned utility customers receive low-cost NRA "preference" power without having to create a publicly-owned power system, rendering petitioners nothing more than paper conduits for that power. As explained by the FERC:

> [T]he MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has

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[7] *See also Allegheny*, 922 F.2d at 79, P.A. at 9-10; *MEUA v. PASNY*, Initial Decision, 42 FERC (CCH) ¶ 63,018 (1988), P.A. 40-42, 54-61.

> been repeatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

On appeal, the Second Circuit affirmed the Commission's criteria and the FERC's application of the criteria to the MDAs and VDPS, emphasizing, as in *PASNY*, that "FERC is the agency that is responsible for administering the NRA," and that on questions of statutory interpretation, " 'great deference' must be accorded 'to the interpretation given the statute by the officers or agency charged with its administration.' " *Allegheny*, 922 F.2d at 80, P.A. at 12, *quoting PASNY*, 743 F.2d at 103, *quoting Connecticut Fund for Environment, Inc. v. EPA*, 696 F.2d 169, 173 (2d Cir. 1982).

REASONS FOR DENIAL OF THE WRIT

The petitions and cross-petition should be denied because they do no more than rehash arguments raised and rejected numerous times. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. The case involves a federal statute, but presents no major federal or constitutional question. In essence, this case concerns nothing more than an interpretation of a statute by the agency charged with its administration, and a decision by an appellate court that the agency's interpretation was a reasonable one.

1. Petitioners argue that Court review is warranted because of several alleged errors in the lower court's application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Specifically, petitioners argue that the court below

improperly deferred to the FERC where: (1) the Commission's ruling was itself based upon an erroneous reading of *MTA* (VDPS Petition at 13-15; NYCPUS Petition at 12-14);[8] (2) deference should have been accorded to PASNY (which had found that the MDAs and VDPS were NRA "public bodies"), not the FERC (VDPS Petition at 15-16; COWPUSA Petition at 27-28); and (3) the Commission's interpretation of the NRA "has changed several times". VDPS Petition at 10.

The lower court's application of the *Chevron* doctrine was appropriate. *Chevron* describes a two-step analysis to be applied when a court is faced with review of an agency's "construction of the statute which it administers":

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

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[8] It is noteworthy that cross-petitioner Rhode Island raised this same argument in its 1986 cross-petition for a writ of certiorari, which this Court denied. *See* No. 86-942, Cross Petition at 21-26; *cert. denied*, 479 U.S. 1085 (1987).

467 U.S. at 842-43 (footnotes omitted). Thus, the Second Circuit first determined that the term "public body" is "not defined in the NRA," and that, therefore, it was appropriate to review the Commission's interpretation of the term. *Allegheny v. FERC*, 922 F.2d at 81, P.A. at 14. Following this Court's *Chevron* analysis, the Second Circuit then found the Commission's three-part criteria to be "reasonable":

> Although we might not have adopted these exact criteria had we analyzed these issues in the first instance, the Commission's construction of the statutory term "public bodies" is not so unreasonable as to amount to an arbitrary and capricious action. In reviewing the Commission's construction, we "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the Court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, (citations omitted).

922 F.2d at 82, P.A. at 16-17. Notwithstanding the court's use of the subjunctive "might" rather than "would" (as VDPS would have it), the Second Circuit cited no instance in which its views differed from those of the Commission, stating instead its agreement with the Commission's "control" criterion. *Id.* at 84 P.A. at 20.[9]

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[9] Undaunted, VDPS claims that it has "been met with a circle of deference in which FERC concludes that its actions are compelled by prior decisions of the Second Circuit, *the Second Circuit disagrees*, but nonetheless concludes that affirmance is compelled

VDPS, joined by NYCPUS, argues that the court erred in that the Commission was entitled to no *Chevron* deference because it had wrongly found that the "key determinant of public body status," "complete operational control of distribution facilities," originated in the Second Circuit's *MTA* decision. VDPS argued:

> *MTA*, FERC stated, "*requires* that the public body *must* control distribution." Opinion No. 329, 48 FERC at 61,466 (86a)(emphasis added).

Petition at 13; *see also* NYCPUS Petition at 13. VDPS goes on to argue that because *MTA* did not address the "control" issue, the Commission could not properly rely upon the decision as the basis for the "control" criterion.

The contention that the Commission, in determining that distribution system control was a "public body" criterion, incorrectly believed itself bound by *MTA*, is not supported by an accurate, complete quotation of the language of the FERC decisions in this proceeding. The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a "public body" control a distribution system; instead, the Commission stated that "the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution." Opinion No. 329, P.A. at 86 (emphasis added). The FERC's reliance then was not on *MTA*, but on the

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under *Chevron*" (Petition at 15, emphasis added). VDPS cites no support for the contention that the "Second Circuit disagrees," and the content of the court's opinion is to the contrary.

legislative history discussed in *MTA*. Shortly thereafter, the FERC stated:

> The ALJ correctly found that to "sell and distribute power directly to consumers of electricity at retail" requires direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity must have control over its distribution system.

Opinion No. 329, P.A. at 88 (footnote omitted).

Thus, the Commission's control criterion was based upon its own interpretation of: (a) NRA legislative history (discussed in *MTA*); and (b) the "sell and distribute directly" standard, which was developed by the FERC in Opinion Nos. 229 and 229-A (MMWEC and CMEEC v. PASNY, 32 FERC (CCH) ¶ 61,194 (1985)), and affirmed in *MTA* (and which this Court chose not to review). Thus, the VDPS-NYCPUS "circle of deference" argument, the linchpin of the two petitions, collapses.

Moreover, support for VDPS's claim that the control criterion was the "key determinant" of "public body status under FERC Opinion No. 329" is nowhere to be found in either the Commission or court decisions. This contention appears to be part of a strategy to disregard or finesse another of the Commission's "public body" criteria, *i.e.* that preference power purchasers must be "directly responsible" for the retail distribution of electricity directly to customers.[10] Petitioners obviously cannot meet this cri-

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[10] For example, in reviewing the ALJ's decision, VDPS states that the Judge's determination that VDPS did not qualify as an

terion because they have assumed *no* utility responsibilities. Instead, VDPS attempts to sweep the "direct responsibility" criterion within its erroneous claims about "control." Thus, VDPS argues that "control" and "direct responsibility" are treated "interchangeably" in the FERC and court orders, and then tries to mount another "circle of deference" claim, stating that the

> [D]irect responsibility criterion appears to derive from FERC's interpretation of the Second Circuit's statement in *MTA* that a public body could not supply customers indirectly, *i.e.*, at wholesale, but had to be "directly responsible" for meeting their needs. *MTA*, 796 F.2d at 593 (citing Opinion No. 229). In turn, FERC concluded that to be directly responsible *MTA* requires control of distribution facilities.

VDPS Petition at 23 n. 17.

The "direct responsibility" criterion is not "derive[d] from FERC's interpretation" of *MTA*, but is instead based on the FERC's own determination in Opinion Nos. 229 and 229-A (affirmed in *MTA*) that an NRA "public body" must be capable of direct retail distribution and cannot "arrange" for such distribution.[11] The statement that "FERC concluded that to

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NRA "public body" relies "principally" on "his control criterion." The cited pages of the decision (Initial Decision, P.A. at 60-61), in which the ALJ evaluates VDPS against the yardstick competition, direct responsibility and control criteria, do not support VDPS's assertion.

[11] As stated by the FERC in Opinion No. 229, the "requirement for direct responsibility is established by court and Com-

be directly responsible *MTA* requires control" is not accompanied by any citation and, as demonstrated above, is contrary to the language of the FERC opinion. Opinion No. 329, P.A. at 881.

It bears noting that just as the Commission did not blindly rely upon *MTA*, neither did the Second Circuit blindly defer to the FERC. The court stated that it "agree[s] with the Commission that the exercise of such control [over distribution] is essential to a finding of 'public body' status." *Allegheny*, 922 F.2d at 84, P.A. at 20. Thus, there was no abdication on the part of either the Commission or the court of their respective duties to evaluate independently the appropriate NRA "public body" criterion.[12]

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mission precedent which refer to 'direct' distribution to the retail customer." P.A. at 83 n.36 (citations omitted).

[12] In general, VDPS seems confused about who -- as between FERC and the Second Circuit -- decided what. Thus, VDPS states that

> [I]n adopting the ALJ's criteria for a public body, FERC stated that it was merely following, *inter alia*, the Second Circuit's holding in *MTA* that "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, 796 F.2d at 593; *see*, Opinion No. 329, 48 FERC at 61,466 (86a).

VDPS Petition at 7. Opinion No. 329 contains no statement, at page 86 or anywhere else, that in affirming the ALJ's criteria, FERC was "merely following . . . *MTA*." Moreover, VDPS's quote of the Second Circuit holding fails to note that the court itself was quoting -- and affirming -- the Commission's determination in Opinion Nos. 229 and 229-A. *MTA*, 796 F.2d at 593 ("[w]e therefore affirm FERC's conclusion that the term 'public bodies' . . . means 'publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity

As a fallback position, VDPS argues that the lower court also erred in that Opinion No. 329 conflicts with the "plain purpose" of the NRA. Petition at 21. That "purpose," which VDPS contends it fulfills, is to "promote 'yardstick competition' between public bodies and private utilities. *MTA*, 796 F.2d at 593." Petition at 19.[13]

The Commission explained why VDPS could neither promote such competition, nor fulfill the statutory objective:

> [S]ince VDPS leases its distribution facilities from the IOUs [investor-owned utilities], and the IOUs actually operate them, the distribution costs which are supposed to provide some part of the benchmark against which to judge IOU performance are those of the IOUs. Thus, no benchmark is possible, and VDPS does not foster yardstick competition.

Opinion No. 329, P.A. at 101.

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at retail' "). Once again, VDPS's "circle of deference" argument relies upon a misrepresentation of the agency and judicial decisions below.

[13] It is also noteworthy (though hardly surprising) that in making this argument VDPS again changes the words of the Second Circuit. The court in *MTA*, 796 F.2d at 592, 593 referred to the fostering of yardstick competition between "private utilities" and either "publicly-owned" or "municipal utilities," not "public bodies." Nonetheless, VDPS repeatedly (Petition at 19, 20 and 24) refers to "public bodies," not "municipal utilities," the phrase used by the court in *MTA*. VDPS's purpose in presenting this misstatement is obvious: yardstick competition requires, first and foremost, a publicly-owned "utility," not merely a public agency authorized to enter into "lease" arrangements which convey no substantive rights.

The Second Circuit endorsed this analysis:

> Simply stated, the Commission concluded that the distribution costs of the lessee public entity and the lessor private utility will always be the same. We find this to be the most compelling argument against the form of leasing arrangement that is before us. If spurring competition is the objective of the NRA, it is difficult to see how the leasing arrangements at issue advance that fundamental objective.

Allegheny, 922 F.2d at 85, P.A. at 21.[14]

Petitioner COWPUSA raises here for the first time in this proceeding the claims that the Second Circuit used "legislative history" to add a "concept, 'yardstick competition,' which has no basis in law or economics and which contradicts the express purposes and intent of the statute" (COWPUSA Petition at i). Cross-petitioner Rhode Island asks the Court to "rein in" the use of legislative history. Rhode Island Cross-Petition at 7-10. These arguments do no more than betray COWPUSA's and Rhode Island's desperation. The same COWPUSA joined in a brief before the Second Circuit which states that the MDAs "provide yardstick competition as envisioned by Congress."[15]

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[14] VDPS argues (Petition at 23) that in this quote the Second Circuit was stating that the absence of distribution cost competition was the " 'most compelling' rationale cited by FERC for the imposition of an operational control requirement." The quote clearly refers to competition, not control. VDPS's characterization is wrong; the reason for its mischaracterization is transparent.

[15] "Joint Brief of MDAs and Supplemental Brief of VDPS," dated July 19, 1990, at page 20.

COWPUSA's attempt now to raise matters not raised below or even contrary to those it raised below should be rejected. *See McCullough v. Kammerer Corporation, et al.*, 323 U.S. 327, 328 (citing cases) (1945).[16]

Finally, cross-petitioner Rhode Island attempts to disown the purpose of the NRA by claiming that the " 'yardstick competition' " concept was the result of "judicial exaltation" and "was not even undisputedly accepted in the legislative history." Rhode Island Cross-Petition at 6-7. In 1984 in *PASNY*, the Second Circuit addressed this issue directly and found that the NRA preference clause was "founded" on the "yardstick competition" concept. *PASNY*, 743 F.2d at 105; *see also MTA*, 796 F.2d at 591-92. It is far too late for Rhode Island to claim that "yardstick competition" is irrelevant. In fact, Rhode Island similarly argued in 1986 that the Commission and Second Circuit had misread the legislative history. No. 86-942, Cross-Petition at 17-21. The argument has no more substantive appeal now than it did five years ago.

2. VDPS and NYCPUS contend that the Second Circuit ruling conflicts with decisions of the D.C. Circuit (VDPS Petition at 10-11; NYCPUS Petition at 13), and argue that the decision will have

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[16] Similarly, COWPUSA argues that the application of the FERC's public body criteria "intermeddl[es]" in "matters fundamentally of state and local concern." (COWPUSA Petition at 31). Instead, COWPUSA argues, state law should be used in setting "public body" standards. *Id.* This argument was not raised below, was rejected in *PASNY*, 743 F.2d at 104-105 (rejecting claim that NRA preference clause must be squared with New York law), and, therefore, constitutes no basis for the granting of a writ of certiorari.

"[p]recedential [r]amifications" for the interpretation of other "federal laws establishing preferences to cheap hydropower for states, municipalities and other public bodies" (VDPS Petition at 11-12; NYCPUS Petition at 8). The Second Circuit's decision does not conflict with rulings in other circuits. VDPS and NYCPUS compare the decision below with the District of Columbia Circuit's refusal to defer to agency findings where those holdings were based on "an erroneous view of the law."[17] The cited cases are irrelevant, for the Second Circuit did not rule that an erroneous Commission interpretation of the NRA is nonetheless entitled to deference. Instead, the court found the Commission's interpretation of the NRA to be reasonable and consistent with the court's own precedents.[18]

3. VDPS contends (Petition at 15-16) that deference should have been accorded to PASNY, not the FERC. This contention was not raised before either the Second Circuit or the FERC. As such, it should not form the basis for granting a writ of certiorari. *McCullough v. Kammerer Corporation, et al*, 323 U.S. at 328.

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[17] VDPS Petition at 10-11, citing, *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir.), *cert. denied sub nom., Meyers Industries v. Prill*, 474 U.S. 948 (1985). *See also International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 708 (D.C. Cir. 1987); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986). NYCPUS Petition at 13-14.

[18] Moreover, the D.C. Circuit's rulings in the cited cases depend heavily on the subject agencies' failure adequately to explain the bases for their results, failures very much at odds with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *See Phillips*, 729 F.2d at 1167, 1169-71; *Prill*, 755 F.2d at 947-48, 956.

In any event, the argument has no merit. It is well-settled that the FERC, not a licensee (such as PASNY) has the authority to interpret and enforce license terms. *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 396-7 (2d Cir. 1980), *cert. denied sub nom., Penn Yan v. New York State Electric & Gas Corp.*, 454 U.S. 821 (1981). The fact that this case involves *Commission* enforcement of an article in PASNY's *Commission* license (and enforcement of a provision in the NRA) puts it in sharp contrast to the genuinely shared jurisdiction at issue in *Secretary of Labor v. Occupational Safety and Health Review Commission*, 111 S.Ct. 1171 (1991), relied on by VDPS. Moreover, the Commission has previously rejected the notion that "[d]eference, if any, belonged to PASNY, not FERC" (VDPS Petition at 15). The FERC, in Opinion No. 151, noted that it had authority to enforce the NRA license terms since "Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." *MEUA v. PASNY*, 21 FERC at p. 61,126. *See also MMWEC and CMEEC v. PASNY*, Opinion No. 229, 30 FERC at p. 61,644 (Commission need not defer to PASNY but may conduct *de novo* review). Thus, prior precedents dispose of the VDPS argument that PASNY, not the FERC, should be given deference.

4. VDPS, relying on the 1976 decision in *State of Vermont Public Service Board v. PASNY*, 55 FPC 1109 (1976) ("*VPSB*"), contends that deferral is improper because the Commission "several times" changed its position on VDPS's status as a "public body". VDPS Petition at 10, 16-17.

VDPS overstates the significance of *VPSB*, arguing that the Commission "explicitly held [in *VPSB*] that VDPS [the successor agency to the Vermont Public Service Board ("VPSB")] was a 'public body'. . . ." Petition at 17. In fact, the 1976 statements concerning VPSB's "public body" status were mere dictum.[19] The *VPSB* dictum was "reversed" in Opinion No. 229, and confirmed in Opinion No. 329. Thus, the alleged change in position occurred at most once, not "several" times, and any change was specifically addressed and explained in Opinion Nos. 229 and 229-A, and affirmed in *MTA*, as to which this Court denied certiorari. VDPS participated fully in those proceedings, but did not challenge before the Second Circuit the *VDPS* reversal. The court below was correct in granting "full" deference to the Commission.

Moreover, the *Chevron* deference doctrine is based on congressional delegation of authority to an agency, not on a need for finality in agency decisionmaking. 467 U.S. at 843-44. As explained in *Chevron*, in analyzing a new agency interpretation of the term "source":

> The fact that the agency has from time to time changed its interpretation of the term "source" does not . . . lead us to conclude

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[19] In *VPSB*, a dispute between Allegheny and VPSB over thirty megawatts of Niagara preference power, the Commission affirmed PASNY's determination that Allegheny should receive all of the disputed thirty megawatts. However, responding to an argument by Allegheny that VPSB did not qualify as a "public body" under the NRA because it resold preference power to investor-owned utilities, the Commission, *in a statement unnecessary to the outcome of the case*, indicated that VPSB did so qualify. 55 FPC at 1113.

> that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. *See also In Re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (administrative authorities may deal with changed circumstances).[20]

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), relied on by VDPS, is not to the contrary. In *INS*, the Court applied the first step of the *Chevron* analysis, ruling that the meaning of the statute at issue was clear, thereby eliminating the need for *Chevron* deference. Moreover, the Court noted that the agency was inconsistent in its own reading of the statute, even to the extent of having already abandoned the very position for which it sought affirmation on the basis of *Chevron* deference, thus discounting the need to defer to the agency. *Id.* at 446, n.30.

5. VDPS (Petition at 12), joined by NYCPUS (Petition at 8), argues that the Second Circuit's ruling "would have substantial precedential impact" in part because the Tenth Circuit recently decided a case involving the meaning of a preference provision in an-

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[20] Other cases from this Court have emphasized the continuing validity of the *Chevron* deference standards quoted above. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-54 (1987) (Scalia, J. concurring); *NLRB v, United Food and Com'l Workers* Union, 484 U.S. 112, 133, (1987) (Scalia, J., concurring, emphasizes continuing validity of *Chevron* in light of "dicta" in *INS*).

other statute. *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991) ("*Salt Lake*"). Both petitioners ignore that the Second and Tenth Circuit rulings are consistent, rendering review by this Court unnecessary.

The issue in *Salt Lake* was very similar to the "public body" question here, the only distinction being that the language in the applicable provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), grants a preference in hydroelectric power sales to "municipalities," a more specific term than "public bodies." The Western Area Power Administration ("WAPA"), interpreted "municipality" to mean a municipality that operated its own utility system, *i.e.*, one with "utility responsibility." The Tenth Circuit, applying *Chevron*, deferred to the agency's definition of "municipality," rejecting appellant's notion that the Oxford English Dictionary provided a sufficiently clear meaning. *Salt Lake*, 926 F.2d at 978, quoting *Chevron*, 467 U.S. at 844, quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961). The WAPA and Tenth Circuit emphasis on "utility responsibility" is in accord with the FERC and Second Circuit criteria for "public body" status—"direct responsibility" and "control" are the very crux of "utility responsibility."

Given the complete consistency between the Second Circuit and Tenth Circuit decisions, even as to their dual reliance on *Chevron*, petitioners are forced to rely on the dissent in the *Salt Lake* case. VDPS Petition at 12, n.10. A dissenting opinion hardly establishes a conflict between circuits meriting this Court's review.

6. VDPS's final argument is that the "control" criterion is "not the product of reasoned decisionmak-

ing" (Petition at 22).[21] In essence, VDPS claims that an NRA "public body" need not be responsible for the provision of any utility services, for the delivery of any specific amount of power, or for the control of any distribution facilities.

The requirements that NRA "public bodies" be directly responsible for consumer needs, and control the distribution facilities used to deliver the power to meet those needs, flow directly from the Commission's prior and judicially-affirmed holding that NRA "public bodies" are "publicly-owned entities that are capable of selling and distributing power directly to consumers at retail," *not* consumers or brokers. *MTA v. FERC*, 796 F.2d at 595, *cert. denied*, 479 U.S. 1085, *citing with approval*, Opinion No. 229, 30 FERC at p. 61,651; *see also* 32 FERC at p. 61,445 (emphasis in original). The FERC had elaborated on this point in Opinion No. 229-A, stating, with regard to VDPS, that

> Although VDPS did arrange for distribution services, it did not "engage" in such services in the sense of being the party *directly responsible* for the needs of the consumers served.

32 FERC at p. 61,444 (emphasis added). Thus, the FERC stated that "control is relevant not merely to the ability to meet customers' requirements but to

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[21] VDPS ignores FERC's requirement that a public body be "directly responsible" for the needs of its customers, arguing instead that "control" and "direct responsibility" are the same thing. (Petition at 23 n. 17). VDPS, by calling "responsibility" "control," cannot finesse the indisputable fact that neither VDPS nor the MDAs have any responsibilities to customers. Opinion No. 329, P.A. at 94-97.

doing so directly. . . ." Opinion No. 329, P.A. at 83 n.36.

First, VDPS argues that "yardstick competition comes from a comparison of rates, not the individual cost components thereof". Petition at 24. VDPS is wrong. "Yardstick competition" comes from the presence of publicly and privately-owned competitors, *i.e.*, real distribution utilities which control their own distribution (and other) costs, which constitute more than an allocated share of someone else's costs. Such entities foster, rather than eliminate, yardstick competition between municipal utilities and investor-owned utilities.

Second, VDPS wrongly claims that no lessee will be able to meet the "control" standard. Petition at 24-25. FERC case law reveals many instances—in the context of both electric and gas utilities—in which lessees have gained precisely the sort of operational (and, therefore, cost) control which VDPS claims is unavailable to petitioner "lessees." By the same token, the Commission has been unwilling to find that merely possessing legal title to, or a leasehold interest in, electric facilities makes the entity a jurisdictional "public utility."[22]

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[22] *See e.g., Citizens Power and Light Corp.*, 48 FERC (CCH) ¶ 61,210 (1989); *Fort Howard Corp.*, 48 FERC (CCH) ¶ 61,303 (1989); *Hennepin Energy Resources Co.*, 48 FERC (CCH) ¶ 62,224 (1989); *Niagara Mohawk Power Corp.*, 37 FERC (CCH) ¶ 61,081 (1986); *El Paso Electric Co.*, 36 FERC (CCH) ¶ 61,055 (1986); *Portland General Electric Co.*, 33 FERC (CCH) ¶ 61,459 (1985); *United Illuminating Co.*, 29 FERC (CCH) ¶ 61,270 (1984); *Public Service Company of New Mexico*, 29 FERC (CCH) ¶ 61,387 (1984); *Pacific Power and Light Co.*, 3 FERC (CCH) ¶ 61,119

Third, VDPS' claim (Petition at 25) that the Commission has *sub silentio* reversed its NRA "public body" determination in two unrelated *Central Vermont Public Service Corporation* orders (Petition at 25 & n.20) is erroneous. In the second of those orders, 53 FERC (CCH) ¶ 61,204 (1990), after having been alerted that VDPS was relying on the FERC's mere repetition of VDPS's self-description in the Second Circuit, the Commission stated expressly that

> [I]ts findings in this proceeding were not intended to reflect on or in any way modify its findings regarding [VDPS's] status for purposes of the issues addressed in Opinion No. 329. [VDPS] can best be described as a broker acting in both the wholesale and retail markets in the State of Vermont.

Id. at 61,818.[23]

Fourth, VDPS claims this criterion is "subject to a number of irreconcilable conflicts." Petition at 26. These "conflicts" do not exist and therefore do not merit Court review. VDPS first cites (Petition at 26) the FERC's recognition that, on occasion, an indus-

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(1978).

The same distinction has been applied with respect to natural gas utilities. *See American Louisiana Pipe Line Company, et al.*, 30 FPC 1211, 1212 (1963); *El Paso Natural* Gas Company, 19 FPC 371, 372 (1958).

[23] The Commission went on to note that a statement in the first *Central Vermont* order (52 FERC (CCH) ¶ 61,278 (1990)) concerning the Department's status as a retail competitor was "from the background section of the order, . . . and was not an assertion of the Commission's position. . . ." 53 FERC at 61,818, n.9.

trial customer is served by more than one supplier (*e.g.*, when the industrial customer serves itself by generating part of the power it needs). This statement is not an admission that an NRA "public body" need not control distribution facilities (or assume utility responsibilities).

VDPS then alleges an exception concerning "borderline agreements," which are inter-*utility* agreements under which a customer located on the "border" of a utility's service territory is for practical reasons actually served using the facilities of a second utility. The Commission determined that such agreements do not violate the control requirement because both companies to a borderline contract "still control their own distribution systems and bill *their own customers*." Opinion No. 329, P.A. at 89 (emphasis supplied). Moreover, even under a borderline agreement, the utility not operating the facilities—unlike VDPS and the MDAs—retains responsibility for ensuring that service is received and that load growth needs are met.

VDPS also contends that the FERC did not "reconcile why its control criterion applies only to distribution facilities". Petition at 26. In fact, the Commission stated (Opinion No. 329, P.A. at 89) that the focus of the NRA was on distribution, not transmission, a concept endorsed by the court in *MTA*, 796 F.2d at 592, and found to be consistent with other federal preference laws. *Id.* at 592 & n.7.[24]

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[24] In so arguing, VDPS, citing the ALJ and the lower court (P.A. at 10 and 44), inaccurately identifies " 'continuity of service' " as the "Commission's justification for the" control criterion (Petition at 26-27). VDPS has left out most of the multiple

Fifth, VDPS (joined by NYCPUS, Petition at 9-10) states that competition does not require control, citing cases in the natural gas and telecommunications industry, and that FERC failed to consider this argument. In fact, FERC recognized this argument, but rejected it:

> It is true that one need not own generation, transmission and distribution facilities to engage in the utility business. However, engaging in the utility business does not qualify an entity to receive preference power under the NRA.

P.A. at 89. In the same vein, it bears repeating that the Commission concluded that:

> In contending that they should be considered innovative alternative public bodies, and in their attacks upon the ALJ's yardstick and direct responsibility criteria, the MDAs and VDPS are simply arguing for the idea that preference power should be made available to the customers of private as well as public utility companies. This view is counter to Congressional intent, and it has been re-

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justifications for the control criterion. As stated by the ALJ:

> The authority to fix rates and conditions of service must include the power to employ cost cutting measures in distribution as well as the ability to ensure the continuity of service. Only if an entity has all of these attributes does it satisfy this criterion.

Initial Decision, P.A. at 44. The reference to the opinion in *Allegheny v. FERC*, 922 F.2d at 79, P.A. at 10, is the portion of the lower court's decision in which it recites the findings of the ALJ.

> peatedly rejected by the courts and the Commission.

Opinion No. 329, P.A. at 84.

7. COWPUSA and Rhode Island, again revealing the apparent futility of their position, claim that the FERC's public body and "yardstick competition" standards "intermeddl[e] with matters fundamentally of state and local concern," COWPUSA petition at 31, and "offend [ ]. . .principles of federalism." Rhode Island petition at 14. This is nonsense. Their position is nothing less than an attack on the constitutionality of the Federal Power Act, which after all authorizes the Commission to issue licenses "to any State or municipality" and makes it unlawful for any "State, or municipality" to construct a hydroelectric project on navigable waters without a Commission license. 16 U.S.C. §§ 797(e), 817. COWPUSA's and Rhode Island's petitions are also the first time in this case that such a broadside attack has been levied on the FERC's licensing authority. They did not raise this issue below.

As explained above, however, the FERC's authority to enforce the Commission-issued license and the NRA against state agencies was an issue in the case leading up to Opinion 229. The Commission, in those decisions, found no reason to give special deference to PASNY because it was a state agency, and the Second Circuit rejected the same claim Rhode Island again makes here. The fundamental facts here are that Congress had and has jurisdiction over the Niagara River, and that the states stand in the same shoes as any other party under the relevant provisions of the Niagara and Federal Power Acts. There is no illegal infringement on states' rights.

CONCLUSION

The Court should deny the petitions for certiorari filed by VDPS, NYCPUS and COWPUSA, and Rhode Island's cross-petition for certiorari.

Dated: July 10, 1991

Respectfully submitted,

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FILED
JUL 10 1991
OFFICE OF THE CLERK

(4) (3) (3) (3)

Nos. 90-1721, 90-1725, 90-1760 and 90-1949

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

VERMONT DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

[Caption Continued on Inside Cover]

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

QUESTIONS PRESENTED

The Niagara Redevelopment Act (NRA), 16 U.S.C. 836-836a, gives "public bodies" a preference in receiving low-cost hydroelectric power from the Niagara Power Project. The questions presented are:

(1) Whether the criteria developed by the Federal Energy Regulatory Commission (the Commission) to identify "public bodies" under the NRA represent a permissible interpretation of the statute.

(2) Whether substantial evidence supported the Commission's conclusion that petitioners are not "public bodies" under the NRA.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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v.

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No. 90-1725

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v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1760

COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 90-1949

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., PETITIONERS

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 922 F.2d 73. The opinion of the Federal Energy Regulatory Commission (Pet. App. 64-109) is reported at 48 F.E.R.C. ¶ 61,124. The Commission's order denying rehearing (Pet. App. 110-114) is reported at 49 F.E.R.C. ¶ 61,069.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1990. A petition for rehearing was denied on February 12, 1991. The petitions for a writ of certiorari in Nos. 90-1721 and 90-1725 were filed on May 9, 1991. The petition for a writ of certiorari in No. 90-1760 was filed on May 13, 1991. The petition for a writ of certiorari in No. 90-1949 was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Niagara Redevelopment Act of 1957 (NRA) (also popularly known as the Niagara Power Project Act), 16 U.S.C. 836-836a, authorized the Federal Power Commission (FPC) to grant a license to the Power Authority of the State of New York (PASNY) to construct and operate a hydroelectric power project on the Niagara River. The NRA directed the FPC in issuing the license to PASNY to impose certain conditions "in addition to those deemed necessary and required under * * * the Federal Power Act [16 U.S.C. 791a et seq.]." 16 U.S.C. 836(b). The conditions prescribed in the NRA required PASNY "in disposing of 50 per centum of the project power [to] give preference and priority to public bodies and nonprofit cooperatives within economic transmission dis-

tance." 16 U.S.C. 836(b)(1). PASNY was also required to make a "reasonable portion" (not to exceed 20%) of that 50%—*i.e.*, up to 10% of power from the Niagara Project—available for use in neighboring States. 16 U.S.C. 836(b)(2).

The FPC issued a license to PASNY for the Niagara Project in 1958, including in the license *verbatim* the conditions prescribed in the NRA. *Power Authority of New York*, 18 F.P.C. 344 (1957); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 106 (1960). Beginning in 1978, various customers of preference power from the Niagara Project filed a series of complaints against PASNY with the FPC's successor, the Federal Energy Regulatory Commission (the Commission). The complaints concerned PASNY's allocation of Niagara Project power among preference and non-preference customers.

In 1978, a complaint against PASNY was filed by the Municipal Electric Utilities Association (MEUA), the representative of the municipal utilities in New York that received preference power. The Commission held that PASNY had violated the NRA and its license by making long-term contracts with private utilities for Niagara Project power without adequately considering the projected needs of preference customers. See *Power Authority of New York* v. *FERC*, 743 F.2d 93, 97 (2d Cir. 1984) [hereinafter *PASNY*].

The Second Circuit affirmed the Commission's holding. In rejecting challenges to the Commission's decision, the court discussed "the nature of the preference created by the [NRA]." *PASNY*, 743 F.2d at 103. The court determined that the purpose of the preference was to promote "yardstick competition" between publicly owned utilities and privately owned utilities. *Id.* at 98-100, 104-105. The prin-

ciple of "yardstick competition" was premised on a "basic determination" by Congress that "if [public bodies] * * * are supplied with cheap hydropower their lower competitive rates will force the private utilities in turn to reduce their rates, with resulting benefits to all." *Id.* at 105.

In 1980, another complaint against PASNY was filed by the associations representing preference customers in Connecticut and Massachusetts: the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Massachusetts Municipal Wholesale Electric Company (MMWEC). In the ensuing proceeding, the Commission held that PASNY had improperly sold preference power to two entities—New York's Metropolitan Transit Authority (MTA) and the Vermont Department of Public Service (VDPS)—that were not "public bodies" within the meaning of the NRA. The Commission based its holding on its determination that neither MTA, which used all of the preference power itself, nor VDPS, which resold the preference power to private utilities, provided "yardstick competition" with private utilities. The Commission concluded that, in light of Congress's purpose to promote such competition, Congress intended the term "public bodies" to mean "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." [1]

The Second Circuit upheld the Commission's definition of "public bodies" under the NRA. *Metropolitan Transp. Auth.* v. *FERC*, 796 F.2d 584 (1986), cert.

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[1] *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 F.E.R.C. ¶ 61,323, at 61,651 (1985); see also *Opinion 229-A; Opinion & Order on Rehearing*, 32 F.E.R.C. ¶ 61,194 (1985).

denied, 479 U.S. 1085 (1987) [hereinafter *MTA*]. The court stated that, although the Commission's definition of "public bodies" was not compelled by the text of the statute, "the legislative history of the NRA demonstrates that [the Commission's definition] is what Congress intended the term to mean." *Id.* at 591. The court reiterated that "Congress' crystal clear intent" was to foster "yardstick competition" between public bodies and private utilities. *Id.* at 593. It agreed with the Commission that Congress believed such competition would occur only if the public entities that received preference power "distributed that power to consumers." *Id.* at 592. The court concluded that "it was implicit throughout the debates that 'public bodies' were publicly-owned entities capable of distributing the preference power they received." *Ibid.*

2. This case began in February 1986, when MEUA filed a complaint with the Commission charging that PASNY was again allocating preference power from the Niagara Project to entities that were not "public bodies" within the meaning of the NRA. MEUA's complaint concerned PASNY's allocations to municipal distribution agencies (MDAs) in New York. The MDAs had arranged to distribute preference power to retail customers by leasing the facilities of private utilities. Additional complaints were filed by MMWEC and CMEEC concerning PASNY's allocation of preference power to VDPS. After a change in state law prompted by the *MTA* proceeding, VDPS had entered into lease agreements with private utilities similar to those entered into by the MDAs. See Vt. Stat. Ann. tit. 30, § 212a (1986). In a consolidated proceeding, the ALJ determined that neither VDPS nor the MDAs were entitled to preference power because they are

not "public bodies" under the NRA. Pet. App. 26-27, 54-63. The Commission adopted the ALJ's decision. *Id.* at 89-101.

a. In accordance with the Commission's pre-hearing order, the ALJ formulated three criteria for identifying "public bodies" under the NRA.[2] He then found that neither VDPS nor the MDAs satisfied any of these criteria.

First, the ALJ stated, "[a]n NRA public body must provide yardstick competition." Pet. App. 40. This requirement, he noted, had been identified in *MTA* as Congress's purpose for creating the "public bodies" preference. *Ibid.* (quoting *MTA*, 796 F.2d at 593). To provide yardstick competition, the ALJ determined, a public body must pose "a threat of takeover or displacement to the investor owned utilities." *Id.* at 40-41. It must also provide "a meaningful opportunity for consumers and regulators to compare the rates and quality of service of the public utility with that of investor owned utilities." Pet. App. 41. Finally, it must "substantially meet the energy needs of its customers." *Ibid.*

In addition to providing yardstick competition, the ALJ determined, "[a]n NRA public body must be

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[2] The Commission's order posed three issues for determination:

> (1) How may governmental entities which lease distribution facilities from investor-owned utilities qualify as NRA "public bodies?"
>
> (2) Does an NRA "public body" need to compete with investor-owned utilities for customers in order to perform a yardstick competition function?
>
> (3) What other responsibilities, if any, must a governmental entity assume to qualify as a "public body" under the NRA?

Pet. App. 27-28.

directly responsible to retail consumers for the electric energy sold and delivered to them." Pet. App. 41. This second requirement, the ALJ observed, had previously been adopted by the Commission and upheld by the Second Circuit in *MTA*. The Commission had held that VDPS could not qualify as a public body merely by reselling preference power to private utilities because, "[a]lthough VDPS did arrange for distribution services [through resale], [it was not] the party *directly responsible* for the needs of the consumers served." *Ibid.* (quoting *Opinion 229-A*, 32 F.E.R.C. at 61,444 (emphasis supplied by ALJ)).

Finally, the ALJ found, "[a]n NRA public body must have control over the distribution system." Pet. App. 42. The ALJ derived this requirement from the Commission's prior conclusion that "only publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail are public bodies under the NRA." *Id.* at 43 (quoting *Opinion 229*, 30 F.E.R.C. at 61,651). The ALJ determined that "[t]o be capable of 'distributing power directly' means to have control of the distribution system so as not to have to rely on, or be constrained by anyone else, and to have a direct seller-customer relationship with each customer." *Ibid.*

Applying these criteria to the MDAs, the ALJ found that MDAs are not public bodies because, under their lease arrangements with private utilities, the private utilities retain control over distributing preference power to retail customers. Pet. App. 54-57. Under the leases, the private utilities reserved exclusive control over the leased facilities and remained exclusively responsible for supplying the needs of retail customers and ensuring continuity of service. *Id.* at 54. The private utilities also reserved the right to suspend or terminate the leases under a variety of

circumstances that prevented the MDAs from exercising "independence of action" in improving rates and quality of service. *Id.* at 55. Moreover, the bills sent to retail customers did not allow any comparison between the private utilities' service and that available from the MDAs. *Id.* at 55-56.

Based on "virtually identical" (Pet. App. 58) leases between VDPS and private utilities in Vermont, the ALJ also concluded that VDPS is not a "public bod[y]." *Id.* at 57-61. The ALJ found that VDPS satisfied only one of the elements of providing yardstick competition; it "suppl[ied] a substantial percentage of Vermont's residents' needs for electricity." *Id.* at 60. VDPS did not, however, furnish retail customers with a basis for comparing the cost or quality of service. *Ibid.* Nor did VDPS have direct responsibility to retail customers for the service provided. Instead, the private utilities reserved exclusive control over distribution and retained full responsibility for providing service. *Id.* at 60-61. The terms of VDPS's leases "le[ft] no room for control by VDPS." *Id.* at 61.

b. The Commission adopted the ALJ's decision. Pet. App. 64-109. The Commission held that the three elements of yardstick competition articulated by the ALJ were "appropriate": "If these elements are absent the customer does not have a real choice among competitors." *Id.* at 88. The Commission also upheld the other two criteria for "public bodies" identified by the ALJ. *Id.* at 79-83, 86-89.[3] Finally, the

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[3] The Commission agreed with the ALJ that public entities do not have to own the system for distributing preference power to satisfy the second criterion—direct responsibility to consumers for distribution of power; instead, the requisite control can be achieved through proper leasing arrangements. Pet. App. 88. The Commission similarly sustained the ALJ's

Commission sustained the ALJ's conclusion that neither VDPS nor the MDAs are "public bodies" under the NRA. *Id.* at 89-101.

3. The court of appeals affirmed. Pet. App. 1-24. The court initially determined that the Commission's interpretation of the NRA and of PASNY's license should be reviewed under the two-part analysis set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that the Commission's factual findings should be upheld if supported by substantial evidence. Pet. App. 12-13.

The court upheld the Commission's criteria for identifying "public bodies" for purposes of the NRA. Pet. App. 13-17. The court observed that "the term 'public body' is not defined in the NRA." *Id.* at 14. The court determined that, in giving content to that term, the Commission properly elaborated upon its prior conclusion that "in order to qualify as a 'public body' an entity must actually deliver its energy to retail customers." *Id.* at 15. The Commission's interpretation, the court held, appropriately "strikes a delicate balance":

> While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Id. at 17.

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conclusion that the third criterion can be satisfied if a public body meets "substantially" all of its retail customers' needs, thereby affording public entities a measure of "flexibility." *Id.* at 88-89.

The court further held that substantial evidence supported the Commission's conclusion that neither VDPS nor the MDAs are "public bodies." Pet. App. 17-23. The court observed that the findings on which that conclusion was based "encompass all of the specific points" that petitioners contended had not been considered. *Id.* at 18. In making those findings, the court held, the Commission properly relied on the terms of petitioners' lease agreements with the private utilities that distributed the preference power. *Id.* at 19. The court agreed with the Commission that, under the leases entered into by the MDAs, "all responsibility for [distribution] operations rested with the IOU [*i.e.*, investor-owned utility]." *Ibid.* The court similarly determined that under its leases VDPS "ha[d] no responsibility for the maintenance, construction, or operation of the distribution facilities" (*id.* at 20-21) and was "essentially * * * precluded from competing with the IOUs on a cost basis" (*id.* at 21). "If spurring competition is the objective of the NRA," the court concluded, "it is difficult for us to see how the leasing arrangements at issue advance that fundamental objective." *Ibid.*

ARGUMENT

The court of appeals properly applied *Chevron*, *supra*, to review the Commission's criteria for identifying "public bodies" under the NRA and correctly concluded that those criteria represent a permissible interpretation of a statute of limited geographic scope. The court was also correct in affirming the Commission's conclusion that petitioners are not "public bodies" for purposes of the NRA. Further review is therefore not warranted.

1. Petitioners contend that the court of appeals improperly relied on *Chevron*, *supra*, in reviewing the

Commission's interpretation of the NRA. They argue that (1) the Commission's interpretation does not reflect the exercise of independent judgment; (2) PASNY's interpretation rather than the Commission's is entitled to deference from a reviewing court; and (3) the Commission's interpretation violates the plain language and intent of the NRA. These arguments do not withstand analysis.

a. Petitioners VDPS and New York City Public Utility Service (NYCPUS) contend (VDPS Pet. 12-15; NYCPUS Pet. 12-14) that the Commission "never exercised its discretion" (VDPS Pet. 12) in this case. Instead, they assert, the Commission considered its decision to be "mandated" by the court of appeals' decision in *MTA*. VDPS Pet. 12-13; NYCPUS Pet. 12-13. That assertion is incorrect.

As the court of appeals stated, the proceedings in this case reflected the Commission's "attempt to clarify further the requisite characteristics of a 'public body.'" Pet. App. 15. At the outset of the proceeding, the Commission issued an order directing the ALJ to "develop criteria for determining when an entity that does not own a distribution system may qualify as a public body." *Id.* at 83 n.36; see note 2, *supra*. Pursuant to the order, the ALJ received extensive evidence and briefing aimed at formulating a set of criteria based on statutory sources and on Commission and court precedent. See Pet. App. 28-44. The criteria ultimately adopted by the ALJ "expand[ed] on concepts * * * initially articulated in *PASNY* and *MTA*." *Id.* at 16.

The Commission correctly viewed the ALJ's criteria as the product of discretionary decision making, and it adopted them because they accorded with the purpose of the NRA and with precedent. The Commission upheld the criterion requiring that a public

body control the distribution system as "a logical interpretation of the precedent." Pet. App. 83 n.36. It held that the requirements for yardstick competition were an "appropriate" way of furthering the purpose of the NRA. *Id.* at 88. Similarly, it upheld the requirement that a public body meet substantially all of its customers' needs as permitting needed "flexibility." *Ibid.*

b. The court of appeals correctly held that the Commission's criteria for identifying "public bodies" deserve "great deference." Pet. App. 12. Congress entrusted the Commission with the responsibility to ensure that PASNY complies with the license for the Niagara Project. The Commission's authority derives from both the NRA and the Federal Power Act. 16 U.S.C. 836(a); see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-124 (1960) (Federal Power Commission had authority under the FPA, 16 U.S.C. 814, to condemn property for Niagara Project). The Commission developed its criteria in the course of determining whether PASNY had complied with its license. The criteria thus represent "an executive department's construction of a statutory scheme it is entrusted to administer," and as such are entitled to "considerable weight." *Chevron*, 467 U.S. at 844.

In contending that PASNY's interpretation of the NRA, not the Commission's, is entitled to deference, petitioner VDPS relies (VDPS Pet. 10, 16) on this Court's decision in *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171 (1991). As petitioner concedes (Pet. 16), however, there are "obvious[]" differences between this case and *Martin*. *Martin* concerned the "unusual regulatory structure" (111 S. Ct. at 1176) of split federal enforcement created in the Occupational Safety and Health Act of

1970. In contrast, under the NRA and the FPA, the Commission is the only agency responsible for enforcing PASNY's compliance with the license for the Niagara Project. Pet. App. 12-13; see *Opinion 229-A*, 32 F.E.R.C. at 61,451 n.12; see also *PASNY*, 743 F.2d at 108 (labelling "doubtful" PASNY's argument that it was entitled to more deference than other licensees of the Commission). For present purposes, PASNY's role is more that of regulatee rather than regulator, and it is the Commission in which Congress has reposed responsibility to enforce the legislative will. Furthermore, because the Commission's responsibilities under the FPA extend to federal power projects across the nation, it clearly has greater expertise than PASNY to decide issues concerning the allocation of power. For all these reasons, the logical conclusion is that Congress intended to invest the Commission, not PASNY, with discretion in interpreting the NRA. Cf. *Martin*, 111 S. Ct. at 1176-1177.

c. Likewise without merit is petitioners' contention that the Commission's "public bodies" criteria violate the plain language and intent of the NRA. At the outset, petitioners are mistaken in relying on "plain language" arguments. See VDPS Pet. 17-22; COWPUSA Pet. 12-24. As the court of appeals observed, "the term 'public body' is not defined in the NRA." Pet. App. 14. The court properly reviewed the Commission's criteria to determine whether they are "based on a permissible construction of the [NRA]." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

In upholding the Commission's criteria as "consistent with the history and purposes of the NRA" (Pet. App. 24), the court of appeals was guided by its prior decisions in *PASNY* and *MTA*. *Id.* at 6-8,

14-17. The court in those cases had held that Congress's "crystal clear intent" in the NRA was to promote "yardstick competition" between publicly owned and privately owned utilities. *MTA*, 796 F.2d at 593; see also *PASNY*, 743 F.2d at 104-107. The court here determined that the Commission's criteria were resonable means of promoting "yardstick competition":

> The Commission's "public body" test strikes a delicate balance. While not requiring public entities directly to own distribution facilities, the test does require such entities to have active management control over the distribution of preference power. Absent such a requirement, the competitive role that we deem essential for "public body" status could not be achieved.

Pet. App. 17.

Petitioners NYCPUS and VDPS concede that the purpose of the "public bodies" preference is to provide "yardstick competition"; they contend, however, that the Commission's criteria go beyond what Congress considered necessary to ensure such competition. NYCPUS Pet. 11-12; VDPS Pet. 20-21.[4] Spe-

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[4] Petitioner COWPUSA takes a different tack, arguing that " 'yardstick competition' is a nonsensical economic doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA" (COWPUSA Pet. 10-11), and that the principle of "yardstick competition" violates the Tenth Amendment because it infringes on the authority of States to apply state law in allocating preference power from the Niagara Project (*id.* at 29-34). In *PASNY* and *MTA*, the Second Circuit considered all of the arguments that COWPUSA raises here and correctly rejected them. See *PASNY*, 743 F.2d at 106 (NRA preempts conflicting state law regarding allocation of preference power from Niagara Project); see also *id.* at 104-106 (discussing "yardstick competition"); *MTA*, 796 F.2d at 591-593 (same). And in *MTA* this Court denied certiorari. 479 U.S. 1085 (1987).

cifically, they assert that (1) Congress intended public bodies to compete only in the supply, not in the distribution, of preference power; and (2) Congress intended only regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities. NYCPUS Pet. 11; VDPS Pet. 20. Based on these assertions, petitioners argue that the Commission's criteria violate Congress's intent by requiring that public bodies control the system for distributing preference power and that consumers be able to compare the cost and quality of service.

The chief difficulty with petitioners' argument is that nothing in the text or history of the NRA supports petitioners' particularized view of congressional intent. Petitioners base their argument exclusively on one sentence in the *MTA* opinion:

> The municipal utilities, Congress hoped, would act as yardsticks by using their supply of hydropower to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return.

796 F.2d at 592, quoted at NYCPUS Pet. 11 and VDPS Pet. 20. Petitioners obviously err in treating the court's statement as if it were statutory text. Moreover, petitioners misread the court's statement. Indeed, the court in *MTA* rejected the argument renewed here that control over distribution was irrelevant to a public entity's status as a "public bod[y]." *MTA*, 796 F.2d at 593 ("public bodies" must be "capable of selling *and distributing* power directly to consumers of electricity at retail") (emphasis added).[5] Moreover, the court in *MTA* never sug-

[5] See also *MTA*, 796 F.2d at 592 ("[I]t was implicit throughout the debates that 'public bodies' were publicly-owned en-

gested that Congress intended only regulators, not consumers, to be able to compare the service provided by private utilities to that provided by "public bodies." It is therefore not surprising that the court in this case saw no inconsistency between the Commission's criteria and the court's prior decision in *MTA*.

At bottom, petitioners' challenge to the Commission's criteria is based on their view that the Commission could have developed a less restrictive definition of "public bodies." [6] Even if that is so, it provides no basis for setting aside the Commission's decision. A reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction." *Chevron*, 467 U.S. at 843 n.11. The Commission's criteria for identifying "public bodies" are fully consistent with the language and intent of the NRA and were therefore properly upheld by the court of appeals.[7]

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tities capable of distributing the preference power they received.").

[6] Petitioners NYCPUS and VDPS cite *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983), in arguing that competition in a regulated industry can be achieved without requiring "yardstick competition." NYCPUS Pet. 9-10; VDPS Pet. 27-28. These decisions are inapposite, and petitioners' arguments beside the point, in light of Congress's purpose in the NRA to encourage yardstick competition, not simply competition of any sort. The Commission properly rejected such arguments, observing that the Second Circuit had previously refused to "second-guess [Congress's] basic determination." Pet. App. 84-85 (quoting *PASNY*, 743 F.2d at 105).

[7] Cross-petitioner contends (Cross-Pet. 4-14) that States should be entitled to receive preference power without regard

2. Petitioners NYCPUS and VDPS contend that the Commission erred in concluding that neither VDPS nor MDAs qualified as "public bodies." VDPS Pet. 16-28; NYCPUS Pet. 10-14 & nn.11-14. The court of appeals properly rejected that contention, observing that petitioners' arguments on this score "are nothing more than veiled attempts at collaterally attacking the 'public body' criteria." Pet. App. 18. As such, petitioners' arguments have been answered above.

The ALJ and the Commission found that neither VDPS nor the MDAs satisfied any of the three criteria for "public bodies." Pet. App. 44-61, 89-101. That finding was based on express restrictions in the lease agreements with private utilities into which VDPS and MDAs had entered. *Id.* at 54-56, 60-61, 94-95, 100-101. Under those agreements, the private utilities retained exclusive control of the distribution system and remained exclusively responsible for meeting the needs of retail customers. *Ibid.* Moreover, the agreements did not permit retail customers to compare the service provided by the private utilities to service provided by the public entities. *Id.* at 55-56, 60, 95, 101. There was thus ample evidence to support the conclusion that neither VDPS nor the MDAs qualified as "public bodies."

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to whether in using it they provide "yardstick competition." The court of appeals correctly rejected that argument. Pet. App. 21-22. This is not a situation in which congressional attention was focused on the activities of private persons; to the contrary, the statutory text at issue applies to "public bodies." The legislative history of the NRA convincingly shows that Congress intended "public bodies" to provide "yardstick competition." Nothing in the text of the NRA or in the legislative history suggests that Congress intended to except States from this requirement.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 292061 20624

Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

(5) (4) (4) (4)

Nos. 90-1721, 90-1725, 90-1760 and 90-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

[Caption Continued on Inside Cover]

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY OF VERMONT DEPARTMENT OF PUBLIC SERVICE TO BRIEFS OPPOSING ITS PETITION FOR A WRIT OF CERTIORARI

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14

COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,

Respondents.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, Et Al.,

Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, Et Al.,

Respondents.

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ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE AN AGENCY ADOPTS A STANDARD BASED ON THE MISTAKEN ASSUMPTION THAT THE STANDARD IS MANDATED BY STATUTE, CASE LAW OR LEGISLATIVE HISTORY

Respondents in this case, the Federal Energy Regulatory Commission (FERC) and several parties who intervened in support of FERC in the case below,[1] have filed briefs in opposition to the petition for writ of certiorari filed by the Vermont Department of Public Service (VDPS or Vermont). However, neither FERC nor those supporting it questioned this basic proposition of law presented in Vermont's petition: If an agency wrongly believes that its application of an ambiguous statute is mandated by law it has not exercised its own discretion and is not entitled to deference from a reviewing court under *Chevron*.[2]

VDPS demonstrated in its petition that FERC erroneously believed the control criterion incorporated into its definition of "public body" was mandated by the Niagara Redevelopment Act (NRA). FERC's response does not refute this point, but indicates that FERC *still* believes its control criterion was mandated by the Act. According to FERC, the control requirement is a "logical interpretation of the precedent." FERC Br. pp. 11-12. The Second Circuit, however, already has said that neither the statute itself nor

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[1] The Connecticut Municipal Electric Energy Cooperative and the Massachusetts Municipal Wholesale Electric Company, the Allegheny Electric Cooperative, Inc., City of Cleveland, the Municipal Electric Utilities Association of New York State, and the Public Power Association of New Jersey.

[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*").

prior case law mandates any of the several public body criteria adopted by FERC (14a). Where an agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification on the agency's behalf. *Dept. of Treasury v. FLRA*, 110 S. Ct. 1623, 1629-30 (1990). *See also Phillips Petroleum Co. v. FERC*, 792 F.2d. 1165, 1169 (D.C. Cir. 1986). Thus, even if an independent rationale for the control criterion could be devised and defended by FERC in the exercise of its discretion, it has not exercised that discretion here and, contrary to the Second Circuit's holding, is not entitled to deference under *Chevron*. *Id.*

The brief of intervenors in support of FERC similarly reinforces rather than defuses Vermont's argument. Intervenors do not dispute that FERC believed itself bound to adopt the control criterion. Instead, they advance the curious argument that the source of FERC's belief was the legislative history of the NRA, rather than prior case law:

> The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a 'public body' control a distribution system; instead, the Commission stated that 'the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution.' Opinion No. 329, P.A. at 86 (emphasis added). *The FERC's reliance then was not on MTA but on the legislative history discussed in MTA.*[3]

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[3] *"MTA"* refers to *Metropolitan Transportation Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Electric Cooperative, Inc. v. FERC*, 479 U.S. 1085 (1987).

Int. Br. at 12-13 (emphasis added.)

This is a distinction without a difference. Whether FERC misread prior case law or legislative history, its decision is not entitled to deference if it erroneously "believe[d] the standard to be dictated by the statute itself" rather than "adopted as a matter of policy in order to effectuate the purposes of the Act." *International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987). See also *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, concurring in relevant part.) The *source* of FERC's error, i.e., the text of the statute, the legislative history or prior case law, is plainly irrelevant.[4] "When the [agency] bases a decision on a standard that it unjustifiably believes was mandated by Congress, the [agency's] decision must not be enforced, even though the [agency] might be able to adopt the very same standard in the exercise of its discretion." *International Brotherhood*, 814 F.2d at 708. Here, FERC's mistaken assumption that a public body is required to have physical control of a distribution system was an error which clearly "infected its promulgation" of a public body definition, *Planned Parenthood*, 712 F.2d at 667,[5] and the Second Circuit incorrectly applied *Chevron* when it deferred to that definition.

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[4] See, e.g., *Prill v. NLRB*, 755 F.2d 941, 952 n.66 (D.C. Cir.) *cert. denied* 474 U.S. 948 (1985) (NLRB found to be "mistaken in its view that the language, history *and* prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the [NLRA] Act." (emphasis added)).

[5] Intervenors supporting FERC appear to argue that the agency's decision is sustainable on the basis of its "separate" direct responsibility criterion. Int. Br. pp. 13-14. However, as Vermont

II. DEFERENCE, IF ANY, WAS DUE PASNY, NOT FERC.

If the Second Circuit owed any deference in this case, it was to the Power Authority of the State of New York (PASNY), not FERC. Vermont Pet. pp. 15-16. FERC responds to this argument by asserting that, unlike *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991) (*Martin*), this case involves no "split enforcement" structure and that "it is the Commission in which Congress has reposed responsibility to enforce the legislative will." FERC Br. p. 13.

Intervenors supporting FERC unwittingly, but directly, refute this assertion with a passage from one of FERC's own orders. Maintaining that "prior precedents dispose of the VDPS argument" (Int. Br. at 20), Intervenors cite FERC's statement in Opinion No. 151 that *"Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." Id.* (quoting *MEUA v. PASNY* (Opinion No. 151), 21 FERC ¶ 61,021, at 61,126 (1982) (emphasis added).[6]

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noted in its petition, the Commission treated these criteria interchangeably, affirming its Administrative Law Judge's decision that "to be directly responsible, a public body * * * must control the distribution system." (73a). In any event, under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), a reviewing court may not assume that, unencumbered by its erroneous view that the control criterion was required, FERC would have adopted the same definition of public body. *See also, Dept. of Treasury v. FLRA*, 110 S. Ct. at 1629-30.

[6] Citing this Court's per curiam decision in *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945), Intervenors also assert that since the *Martin* issue was not raised before the Second Circuit it cannot form the basis for granting a writ of certiorari. Int. Br. p. 19. This Court, however, has no such

This separation of functions brings the instant case squarely within the framework of *Martin*, which, in turn, overrides any prior FERC assertions that PASNY is not entitled to deference. The Occupational Safety and Review Commission's (OSHRC) role, as described in *Martin*, was not policy-fashioning, but adjudicatory. Because the Secretary of Labor, not OSHRC, had day-to-day responsibilities for administering the statute, the Court held that Congress intended to invest interpretative power in the Secretary. *Martin*, 111 S. Ct. at 1177. Similarly, it is PASNY, not FERC, which bears responsibility for allocating preference power, setting rates for that power and assuring its transmission. FERC's self-described role in the process is purely adjudicatory:

> We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

Opinion No. 229-A, 32 FERC ¶ 61,194, at 61,451 n.12 (1985).[7] In these circumstances the Second Circuit should not have deferred to FERC.

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ironclad standard. See *Vance v. Terrazas*, 444 U.S. 252, 258, n.5 (1980); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc.*, 340 U.S. 211, 214 (1951). More important is that the error cited in Vermont's petition was the Second Circuit's decision to defer to FERC. That error did not occur *until* the Second Circuit rendered its opinion. Finally, the *Martin* decision was not issued by this Court until *after* the Second Circuit's decision. The applicability of an intervening decision of this type is an appropriate subject of a petition for writ of certiorari. *Vandenbank v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941).

[7] FERC's further assertion that it should be given deference

III. THE SECOND CIRCUIT ERRED IN DEFERRING TO AN AGENCY STANDARD WHICH DENIES PUBLIC BODY STATUS TO PUBLIC ENTITIES WHICH SATISFY THAT COURT'S OWN STATED UNDERSTANDING OF THE STATUTE'S INTENT

FERC correctly observes that under the Second Circuit's 1986 decision in *MTA* the " 'crystal clear' intent of the statutory preference for public bodies is to promote yardstick competition." (FERC Br. p. 5, 14). Yardstick competition itself, it bears repeating, is not a term found in the statute. If, however, promotion of yardstick competition is the purpose of the NRA, then public entities which provide yardstick competition must be public bodies. Conversely, any definition of public bodies that denies public body status to such yardstick competitors is inherently arbitrary and cannot be entitled to deference from a reviewing court. The Second Circuit held in *MTA* that public entities whose retail rates can be compared by regulators to those charged by private utilities provide

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because its "responsibilities under the FPA extend to federal power projects across the nation", thereby giving it "greater expertise than PASNY to decide issues concerning the allocation of power" (FERC Br. p. 13), is simply untrue. While FERC has a very limited, "appellate body" role in *rate*-setting for federal power marketing agencies, *United States v. City of Fulton*, 475 U.S. 657, 663 (1986); *CP National Corp. v. Bonneville Power Administration*, 928 F.2d 905, 911 (9th Cir. 1991), most agencies charged with marketing federal preference power *allocate* that power without *any* FERC role, even an adjudicatory one. (The various federal preference power statutes are identified in Vermont's petition, p. 11 n.9). Where reviewing courts have found an ambiguity in the statutory allocation scheme, they have given those agencies deference. See, *e.g.*, *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). PASNY, not FERC, is the counterpart of those agencies.

yardstick competition. As VDPS has pointed out, there was no dispute from the Commission that VDPS provided the requisite regulatory yardstick. *Id.*[8] VDPS argued, therefore, that the Second Circuit's error was in deferring to a FERC definition of yardstick competition which expressly held that only public entities which facilitated consumer comparisons, not regulatory comparisons, would qualify as public bodies. Vermont Pet., p.20. When FERC adopted a standard holding that only *some* yardstick competition qualifies, it strayed so far from the statutory text as to remove any basis for a court to defer to its interpretation. *Id.*

FERC simply has no answer to this argument. Instead, it answers an argument VDPS never made. According to FERC, VDPS has contended that "Congress intended *only* regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities." FERC Br. p. 15 (emphasis

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[8] Vermont petition, p. 20 (citing *MTA*, 796 F.2d at 592). Oddly, FERC accuses Vermont of error "in treating the court's statement [in *MTA*] as if it were statutory text." FERC Br. p. 15. It is FERC which has adopted a public body definition wholly divorced from the text of the statute. Indeed, in the same paragraph of its brief where FERC criticizes Vermont for reliance on the Second Circuit's *MTA* decision, FERC cites the decision for the proposition that the NRA *requires* a public entity to control a distribution system in order to qualify as a public body—the very proposition which the Second Circuit *did* reject in the case now before this Court (14a).

added).[9] VDPS has never contended that a public entity whose rates and services can be compared by consumers to those of private utilities is not a public body.[10] The Second Circuit's error was in affirming a public body definition which excluded public entities capable of providing a regulatory yardstick, *i.e*, yard-

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[9] FERC misstates another argument made by Vermont in attempting to bolster its claim to deference. According to FERC, VDPS has ignored the requirement of *MTA* that a public body be "capable of selling *and distributing* power directly to consumers at retail," FERC Br. p. 15 (quoting *MTA* 796 F.2d at 593 (emphasis in original)), and instead has argued that "competition in a regulated industry can be achieved without requiring 'yardstick competition'." FERC Br. p. 16 n.6. Vermont has argued nothing of the sort. In *MTA* the Second Circuit held that "*[y]ardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers.*" 796 F.2d at 592 (emphasis added). What Vermont has pointed out is that, as in the telecommunications and natural gas industries, access to, not control of a distribution system is all that is necessary to compete in selling and distributing power to ultimate consumers (Pet. pp. 27-28), and that FERC had never given a reasoned explanation why more was demanded of a public body. *Id.* The lower court itself seems erroneously to have assumed that only "active management control over the distribution of preference power" was being required (17a) rather than the complete *operational* control of the distribution facilities actually required in Opinion No. 329 (73a, 80a-83a, 88a). Management control over the distribution of preference power, of course, is achieved if the public body has *access* to the facilities used to distribute its power (36a).

[10] On the contrary, we argued to the lower court—and reiterated in our petition here—that FERC erred in failing to consider a Vermont statute which mandates a comparison on consumer bills between the rates of VDPS and private utilities (Vermont pet. p. 7, n. 7; 20a, n.1).

stick competition as that court *itself* had defined the term.

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July 31, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

Supreme Court, U.S.
FILED
AUG 9 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND THE RHODE ISLAND PUBLIC UTILITIES COMMISSION,
Cross Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, VERMONT DEPARTMENT OF PUBLIC SERVICE AND COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,
Cross Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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IN THE

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OCTOBER TERM, 1991

Nos. 90-1721, 90-1725, 90-1760, 90-1949

NEW YORK CITY PUBLIC UTILITY SERVICE, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PUBLIC SYSTEMS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Allegheny Electric Cooperative, Inc., the City of Cleveland, Ohio, the Connecticut Municipal Electric Energy Cooperative, the Massachusetts Municipal Wholesale Electric Company, the Municipal Electric Utilities Association of New York State and the Public Power Association of New Jersey (collectively referred to herein as "Public Systems"), file this supplemental brief in opposition to the petitions for writs of certiorari filed in cases numbered 90-1721, 90-1725, 90-1760 and 90-1949 in order to bring

to the attention of the Court new matter that was not available at the time Public Systems filed their primary brief in opposition. Sup. Ct. Rule 15.7.

Petitioners Vermont Department of Public Service (Petition at 12, 19) and New York City Public Utility Service (Petition at 8) rely on the dissent in *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991), *reh'g denied* (April 18, 1991), in partial support of their petitions.

In *Salt Lake*, all deadlines for parties to seek further review after the denial of rehearing expired on July 17, 1991. No petition for a writ of certiorari was filed and the *Salt Lake* decision is now final in all respects.

There was never any basis for certiorari in reliance on a dissent. There certainly is none now given the finality of the *Salt Lake* majority decision.

The Court should deny the pending petitions for writs of certiorari.

Dated: August 9, 1991

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